SUPREME COURT, U. S.

Supreme Court, U. S.
FILED
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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-2581

RAY ELBERT PARKER,

*Petitioner,*

*v.*

JOHN G. LORENZ,
LIBRARIAN OF CONGRESS, *et al.*,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No.

RAY ELBERT PARKER,

*Petitioner,*

*v.*

JOHN G. LORENZ,
LIBRARIAN OF CONGRESS, *et al.*,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner, Ray Elbert Parker, respectfully prays that a Writ of Certiorari issue to review the judgment and final order of the United States Court of Appeals for the District of Columbia Circuit entered on May 23, 1975.

## OPINIONS BELOW

The opinion of the United States Court of Appeals, which is not yet reported, is set out in the Appendix A hereto at page 1a. The Opinions of the United States District Court, which are not reported, are set out in the Appendix B and Appendix C hereto at pp. 1b and 1c.

## JURISDICTION

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. §1254(1), and pursuant to Rule 19(b) of the Supreme Court Rules. Petitioner believes that the three issues presented to this Court for the first time involve conflict of judicial opinion between the courts on the same matters and important questions of law which have not been, but should be, settled by this Court. The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on May 23, 1975.

## QUESTIONS PRESENTED

1. Whether the polygraph examination test of truth or deception has reached that level of scientific reliability, validity, acceptability, and industry professionalism, where the results of such a test should be admitted as expert opinion bearing upon the credibility of a party who offers such evidence and whether failure by the courts to recognize the use of polygraph test and expert testimony of a qualified polygraph examiner's interpretation of the results of polygraph test denies petitioner access to proof necessary to withstand Motion to Dismiss or in the alternative, for Summary Judgment?

2. Whether denial of promotion and opportunity for advancement brought about by misconduct of public

officials and abuse of administrative power by a federal agency are subject to review when veteran is the victim of indiscreet and illegal action?

3. Whether petitioner had hearing rights under the Equal Employment Opportunity Act of 1972?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States, Amendment V:

> "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall property be taken for public use, without just compensation."

Section 717(b) of the Equal Employment Opportunity Act of 1972 (Public Law 92-261; 86 Stat. 103), provides:

> "With respect to employment in the Library of Congress, authorities granted in this subsection for the Civil Service Commission shall be exercised by the Librarian of Congress . . . an employee or applicant for employment, if aggrieved by the final disposition of his Complaint, or by the failure to take final action on his complaint, may file a civil action as provided in section 706, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant."

Veterans Preference Act of 1944 (58 Stat. 390), provides:

> "In certification for appointment, in reinstatement, in reemployment, and in retention in civilian positions in all establishments, agencies, bureaus, administrations, projects, and departments of the Government, permanent or temporary, and in either the classified civil service; the unclassified civil service; any temporary or emergency establishment, agency, bureau, administration, project, and depart-

ment created by Act of Congress or Presidential Executive Order, preference shall be given to those ex-service men and women who have served on active duty in any branch of the armed forces of the United States and have been separated therefrom under honorable conditions." 5 U.S.C.A. §§2108, 3501, 3502, 7511, 7512, 7701

## STATEMENT OF THE CASE

On April 17, 1973, petitioner filed an administrative complaint with the Library of Congress based on abuse of administrative power and failure of the Library of Congress to follow their own published guidelines in the promotion and career development of copyright examiners. This complaint was filed after consent, investigation and counseling by the Employee Relations Office of the Library of Congress. On April 18, 1973, petitioner filed a second administrative complaint with the Library of Congress alleging discriminatory employment practices under the Equal Employment Opportunity Act of 1972 and challenging the due process system as applied in the Library of Congress on constitutional grounds.

On June 19, 1973, the Library of Congress issued petitioner a written statement that he lacked a remedy in the agency. It was alleged by the Library that the June 19, 1973 statement was the official administrative record which was appealable to the District Court within thirty days.

On June 27, 1973, petitioner filed a complaint in the District Court for declaratory judgment and injunction to determine whether agency action denying opportunity to develop full and complete administrative record and right to administrative hearing under Veterans' Preference Act and Equal Employment Opportunity Act of 1972 violated statutory law. On July 10, 1973, petitioner filed

a second action in the District Court based on the Library's failure to entertain his April 18, 1973 administrative complaint. On July 30, 1973, respondents filed for a motion to dismiss which was denied by the District Court on September 10, 1973. The Court also issued a separate order on September 10, 1973 for consolidation of both cases.

Plaintiff promptly served upon respondents subpoena for production of documents, subpoena for depositions and interrogatories. On September 26, 1973, respondents again filed for a motion to dismiss or in the alternative, for summary judgment based on the same grounds previously denied by the District Court. As the result of petitioner's willingness to proceed with the discovery process, respondents' also filed a motion for protective order or stay of discovery on September 27, 1973. The motion for protective order or stay of discovery was denied by the Pretrial Examiner on November 9, 1973. The subsequent appeal by respondents from the order of the Pretrial Examiner was denied by the District Court on December 12, 1973.

On January 8, 1974, respondents filed a third appeal in the form of a "Motion for Protective Order or in the alternative, to stay discovery" in an attempt to avoid the discovery process. Respondents motion was again denied, but the court limited petitioner's discovery to question of "jurisdiction." Petitioner appealed the ruling on grounds that jurisdiction was established by the complaint, files, records and proceedings in the Court and that the issue of "jurisdiction" was not synonymous with question of "exhaustion of administrative remedies." Petitioner's motion was denied by the District Court on January 21, 1974. This limitation by the Court placed an unreasonable burden upon petitioner because it al-

lowed respondents to adopt an unsupportable claim that they could avoid subpoena of documents or subpoena for depositions or answering interrogatories on grounds that relevancy was lacking and discovery could not go beyond the "jurisdiction" issue. All attempts by traditional means of discovery were discouraged by respondents on grounds they had nothing relevant to contribute to the discovery process. Petitioner also filed numerous motions to compel discovery, but all were denied by the District Court.

On February 15, 1974, petitioner filed a motion with the District Court for a ruling on the admissibility of polygraph testimony by a qualified expert in order to narrow the issues. This motion was not opposed by respondents, but was denied by the District Court without benefit of argument. The District Court also granted respondents Motion for Summary Judgment.

On June 12, 1974, petitioner filed another action resulting from denial of due process by the agency alleging: That he was an employee in good standing of the agency; that administrative remedies were exhausted prior to judicial action; that the agency violated and continues to violate position and classification standards affecting promotion and career of petitioner; that there has been and continues to be disparity of treatment of petitioner under the published guidelines for training and promotion of copyright examiners; that the respondents have conspired to deny due process and proper judicial review of allegations in the complaint; that respondents are guilty of both negligence and abuse of administrative discretion; that the current altering of classification of personnel without notice and due process is illegal and in violation of federal guidelines; that duly authorized employee representatives in the agency breached their

duty to fairly represent petitioner and conspired to deny due process.

On October 16, 1974, the District Court granted respondents motion to dismiss while at the same time denying petitioner's motion for summary judgment and other timely motions to compel discovery.

On May 23, 1975, the United States Court of Appeals for the District of Columbia affirmed that dismissal without reviewing the constitutional issues raised on appeal. The District Court had original jurisdiction pursuant to EEO Act of 1972 §706; 28 U.S.C. §§1331, 1332, 1361, 2201, 2202 and the Fifth Amendment to the United States Constitution.

## REASONS FOR GRANTING THE WRIT

### I.

**WHETHER THE POLYGRAPH EXAMINATION TEST OF TRUTH OR DECEPTION HAS REACHED THAT LEVEL OF SCIENTIFIC RELIABILITY, VALIDITY, ACCEPTABILITY, AND INDUSTRY PROFESSIONALISM, WHERE THE RESULTS OF SUCH A TEST SHOULD BE ADMITTED AS EXPERT OPINION BEARING UPON THE CREDIBILITY OF A PARTY WHO OFFERS SUCH EVIDENCE AND WHETHER THE FAILURE BY THE COURTS TO RECOGNIZE THE USE OF THE POLYGRAPH TEST AND EXPERT TESTIMONY OF A QUALIFIED POLYGRAPH EXAMINER'S INTERPRETATION OF THE RESULTS OF POLYGRAPH TEST DENIES PETITIONER ACCESS TO PROOF NECESSARY TO WITHSTAND MOTION TO DISMISS OR IN THE ALTERNATIVE, FOR SUMMARY JUDGMENT?**

Petitioner seeks review of the polygraph question by this Court based on fact that (1) there is a conflict of judicial opinion between the courts on an important point of law and; (2) it is submitted that the courts in

polygraph cases are erroneously applying standards which are not proper for determining the ordinary admissibility of evidence. Petitioner's Brief to the Appellate Court is attached as Appendix D and submitted in support of the Petition for Writ of Certiorari.

II.

**WHETHER DENIAL OF PROMOTION AND OPPORTUNITY FOR ADVANCEMENT BROUGHT ABOUT BY MISCONDUCT OF PUBLIC OFFICIALS AND ABUSE OF ADMINISTRATIVE POWER BY A FEDERAL AGENCY ARE SUBJECT TO REVIEW WHEN WAR VETERAN IS THE VICTIM OF INDISCREET AND ILLEGAL ACTION?**

Petitioner requests judicial relief on issue of veterans' preference rights in the Library of Congress since there has been (1) a denial of due process; (2) lack of administrative remedy; (3) a substantial departure by the agency from applicable procedures and published guidelines for promotions; [1] (4) a misconstruction of law governing veterans' rights; [2] (5) failure by the agency to consider veterans' preference in the selection, promotion and career development of such employees among a staff in excess of 5,000 career workers; or (6) like error going to the heart of administrative determination.

It is, therefore, submitted that judicial review on the veterans' issue would not be significantly aided by additional administrative review since it is clear from *Barger v. Mumford, supra,* that exhaustion of agency remedies on the subject would be an exercise in futility. *United Black Fund, Inc. v. Hampton,* 352 F. Supp. 898, 902

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[1] *Ringer v. Mumford,* 355 F. Supp. 749 (U.S. Dist. Ct., D.C. 1973).

[2] *Barger v. Mumford,* 265 F.2d 380, 105 U.S. Appls. D.C. (1959).

(U.S. Dist. Ct. D.C., 1972). The implication of *Barger v. Mumford, supra,* is that Congress meant to provide a right without a judicial remedy.

## III.

### WHETHER PETITIONER HAD HEARING RIGHTS UNDER THE EQUAL EMPLOYMENT OPPORTUNITY ACT OF 1972?

It is submitted that the Equal Employment Opportunity Act of 1972 applies to the Library of Congress on an equal basis with the Civil Service Commission. In addition, that the law applies retroactively to petitioner including the March 24, 1972 effective date of said act. *Harrison v. Butz,* CA No. 2525-72 (U.S. Dist. Ct. D.C., May 24, 1973); EEO Act 1972 §717. It is equally clear that the thrust of the EEO Act of 1972 was not limited to protection for only minority groups. *Mancari v. Morton,* 359 F. Supp. 585, 589 (U.S. Dist. Ct., 10th Cir.); *Parks v. Brennan,* 380 F. Supp. 790 (U.S. Dist. Ct., N.D. Ga., Atlanta Div., 1974).

The failure by the Library of Congress to observe rights established by statutory law make attempted resolution through administrative channels of employee grievance abortive and of no effect. Thus, the Court is asked to decide whether the Equal Employment Opportunity Act of 1972 and the Veterans' Preference Act are applicable to the Library of Congress.

## CONCLUSION

For the above reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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MAY 23, 1975

## APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1432 — September Term, 1974
Civil 1383-73

Ray Elbert Parker, individually and on behalf of all others similarly situated, Appellant

v.

John G. Lorenz, individually and as Librarian of Congress

---

No. 74-1645

Ray Elbert Parker, individually and on behalf of all others similarly situated, Appellant

v.

L. Quincy Mumford, individually and as Librarian of Congress

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No. 74-1765 — Civil 1293-73

Ray Elbert Parker, Appellant

v.

John G. Lorenz, Acting Librarian of Congress

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No. 74-2095 — Civil 74-889

Ray Elbert Parker, Appellant

v.

L. Quincy Mumford, Appellee

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APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA.

Before: Bazelon, Chief Judge, Tamm, Circuit Judge and Edwards*, United States Circuit Judge for the Sixth Circuit

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia and were argued by counsel. On consideration of the foregoing it is

ORDERED AND ADJUDGED by this Court that the judgments of the District Court appealed from herein are hereby affirmed.

Per Curiam
For the Court
/s/ Hugh E. Kline
Clerk

*Sitting by designation pursuant to 28 U.S.C. §291(a)

## APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| RAY ELBERT PARKER, Plaintiff, v. L. QUINCY MUMFORD, ET. AL. Defendants. | ) | Civil Action No. 1293-73 |
| RAY ELBERT PARKER, Plaintiff, v. L. QUINCY MUMFORD, et al., Defendants. | ) | Civil Action No. 1383-73 |
| RAY ELBERT PARKER, Plaintiff, v. L. QUINCY MUMFORD, et al., Defendants. | ) | Civil Action No. 370-74 |

ORDER

These matters came before the court on defendants' motions to dismiss or, in the alternative, for summary judgment on No. 1293-73 and No. 1383-73, and defendants' motion to dismiss in No. 74-370. Defendants argue in each motion that these suits are premature because plaintiff has failed to exhaust his administrative remedies. In addition, defendants contend that these actions are barred by the doctrine of official immunity.

The court agrees with the defendants that plaintiff is not properly in federal court, since he has failed to ex-

haust the administrative remedies available to him as a Library of Congress employee. Despite plaintiff's assertion and ample discovery in this regard, there is no evi-

tions and ample discovery in this regard, there is no evidence in the record that plaintiff has pursued these remedies. In addition, the court finds that plaintiff has failed to establish any compelling reason why his failure to exhaust available administrative remedies should be excused. If these suits were allowed to proceed, it would be necessary for the court to create an original record in these matters. As was stated in *Freeman v. Shultz:*

> "The need to find facts and draw original conclusions entirely eliminates the usefulness of administrative investigations into such matters, and places a burden upon the judiciary that was designed to be borne by a specialized administrative body."

486 F.2d 120, 123 (D.C. Cir. 1972). Therefore, plaintiff must first pursue his remedies at the Library of Congress. Since these matters must be dismissed as premature, the court does not pass on defendants' contention that this litigation is barred by the doctrine of official immunity.

Upon the foregoing, it is by the court this 17th day of June, 1974,

ORDERED that Civil Action Nos. 1293-73, 1383-73 and 370-74 be, and the same hereby are, dismissed.

/s/ Thomas A. Flannery
UNITED STATES DISTRICT JUDGE

## APPENDIX C

[Filed Oct 16 1974, James F. Davey, Clerk]

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

| | | |
|---|---|---|
| RAY ELBERT PARKER, Plaintiff, | ) | |
| v. | ) | Civil Action No. |
| L. QUINCY MUMFORD, et al., Defendants. | ) | 74-889 |

### ORDER

This matter came before the court on plaintiff's motion for summary judgment and defendants' opposition thereto, and on defendants' motion to dismiss for failure to exhaust his administrative remedies and plaintiff's opposition thereto. Plaintiff, a GS-11 Copyright Examiner in the United States Copyright Office, Library of Congress, brought this action seeking money damages, declaratory and injunctive relief, including retroactive promotion to GS-12, against defendant Librarian of Congress and other Library of Congress officials for alleged discriminatory employment practices in failing to properly train and promote plaintiff. Plaintiff previously filed three other actions, Civil Nos. 1383-73, 1293-73 and 370-74, which raised similar issues and which were dismissed by this Court's Order of June 17, 1974, for failure to exhaust administrative remedies. Plaintiff alleges that the present action is based on newly-acquired injuries and damages which are unrelated to the previous actions and which do not involve the same issues. A

review of the present and past complaints fails to confirm plaintiff's contentions.

Although plaintiff alleges that Library personnel are carrying on a broad scheme which denies plaintiff of equal promotional opportunity, his basic claim is the same as in past suits, that he was wrongfully denied promotion. In order to file such a claim in this court the plaintiff first must exhaust available administrative remedies. Although the court is cognizant of the hospitable approach which generally must be taken with *pro se* litigants,[1] it is apparent from the pleadings that plaintiff has failed to exhaust the remedies available to him at the Library of Congress. While plaintiff also alleges that Library officials are frustrating his attempts to properly pursue administrative remedies, there is no evidence in the record to support this charge or to establish any compelling reason why his failure to exhaust his remedies should be excused. The affidavit of Elizabeth Ridley, Employee Relations Officer, demonstrates that the Library is willing to permit Mr. Parker to join all his complaints so that they could be heard by one hearing officer. At the time of the hearing on this motion plaintiff had not yet presented his claims before a hearing officer at the Library, although a memorandum of September 10, 1974, from Hobert D. Johnson, Employee Relations Specialist, to plaintiff indicates that plaintiff has been informed of his right to consolidate his claims and appeal to a hearing officer.

The sole issue as to which plaintiff has exhausted his administrative remedies is the Library's cancellation of plaintiff's discrimination claim filed with the Equal

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[1] *Alley v. Dodge Hotel*, Civil Action No. 74-8016 (D.C. Cir., filed July 23, 1974).

Opportunity Office. Plaintiff does not, however, appear to challenge the cancellation in the present complaint.[2]

As the Court previously noted, if this suit were allowed to proceed it would place a burden upon the judiciary that was designed to be borne by a specialized administrative body. *See Freeman v. Shultz*, 468 F.2d 120, 123 (D.C. Cir. 1973). Therefore, plaintiff must first pursue his remedies at the Library of Congress. Since these matters must be dismissed as premature, the Court does not pass on defendants' contention that this litigation is barred by the doctrine of official immunity.

Upon the foregoing, it is by the Court this 16th day of October, 1974,

ORDERED that plaintiff's motion for summary judgment be, and the same hereby is, denied; and it is further

ORDERED that defendants' motion to dismiss for failure to exhaust administrative remedies be, and the same hereby is, granted; and it is further

ORDERED that in light of the disposition of this matter all plaintiff's other pending motions, including motions to compel production, for an extraordinary hearing, and for a hearing before a pretrial examiner be, and the same hereby are, denied.

/s/ Thomas A. Flannery

UNITED STATES DISTRICT JUDGE

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[2]Even if plaintiff were seeking review of this action, the court finds that the cancellation was not without a reasonable basis. While the affidavits of Mr. Brackeen and Mr. Richardson evidence some conflict over the facts leading up to the cancellation it is clear that it eventually resulted from a failure to prosecute. Moreover, even if the cancellation were arbitrary and capricious, the most this court could do would be to order the Library of Congress to reinstate the complaint with the Equal Opportunity Office. It could not inquire into the merits of the complaint or direct the Office's decision on the jurisdictional question.

APPENDIX D

IN THE

# UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1432

RAY ELBERT PARKER,

*Appellant,*

v.

L. QUINCY MUMFORD,
LIBRARIAN OF CONGRESS, *et al.*,

*Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

## BRIEF FOR APPELLANT

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II. WHETHER DENIAL BY THE DISTRICT COURT OF USE OF POLYGRAPH TEST AND EXPERT OPINION IN THE DISCOVERY PROCESS DENIES APPELLANT ACCESS TO PROOF NECESSARY TO WITHSTAND APPELLEES MOTION FOR SUMMARY JUDGMENT ..... 8

III. WHETHER A FEDERAL GOVERNMENT AGENCY OR ITS OFFICERS ARE BEYOND THE SUBPOENA POWER OF A FEDERAL COURT ..... 10

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IN THE

# UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1432

RAY ELBERT PARKER,

*Appellant,*

v.

L. QUINCY MUMFORD,
LIBRARIAN OF CONGRESS, *et al.*,

*Appellees.*

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

## BRIEF FOR APPELLANT

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW*

In the opinion of the appellant, the three paramount issues presented for review in this appeal are:

1. Whether or not the polygraph examination test of truth or deception has reached that level of scientific

*This case has not previously been before this Court under the same or similar title or name and number of such prior case.

reliability, validity and acceptability, and industry professionalism, where the results of such a test should be admitted as expert opinion bearing upon the credibility of a party who offers such evidence in civil litigation?

2. Whether denial by the District Court of use of polygraph test and expert opinion in the discovery process denies appellant access to proof necessary to withstand appellees' Motion for Summary Judgment?

3. Whether a federal government agency or its officers are beyond the subpoena power of a federal court?

## STATEMENT OF THE CASE

For the purpose of this brief appellant limits this appeal to the questions of discovery and use of polygraph test in civil litigation and whether a federal government agency or its officers are beyond the subpoena power of a federal court?

On January 8, 1974, appellees filed for a "Motion for Protective Order or in the alternative, to stay discovery" to avoid the discovery process. The first motion for such an order by appellees was denied by the Pretrial Examiner on November 9, 1973, while appeal by appellees to the United States District Court for the District of Columbia on the same motion was denied on December 12, 1973.

However, on January 21, 1974, the District Court denied their third motion for protective order, but did limit discovery to the sole question of "jurisdiction." This limitation by the court placed upon appellant a burden which should not have been necessary because this allowed appellees to adopt an unsupportable claim that they could avoid subpoena of documents or subpoena for depositions on ground "that relevance is

lacking." Thus, the injured employee unsuccessfully seeking the subpoena had no other means of obtaining discovery to elicit information other than by motion for admissibility of polygraph evidence which was denied by order of the District Court.

It is from this order and related orders on discovery that appellant now appeals. The District Court's jurisdiction over the subject matter and the legislative branch was firmly established by *Ringer v. Mumford*, 355 F. Supp. 749 (U.S. Dist. Ct. D.C., 1973); *Estes v. Spence*, 338 F. Supp. 319 (U.S. Dist. Ct. D.C., 1972); *Powell v. McCormack*, 395 U.S. 486 (1969).

## ARGUMENT

### I.

**WHETHER OR NOT THE POLYGRAPH EXAMINATION TEST OF TRUTH OR DECEPTION HAS REACHED THAT LEVEL OF SCIENTIFIC RELIABILITY, VALIDITY, ACCEPTABILITY AND INDUSTRY PROFESSIONALISM, WHERE THE RESULTS OF SUCH A TEST SHOULD BE ADMITTED AS EXPERT OPINION BEARING UPON THE CREDIBILITY OF A PARTY WHO OFFERS SUCH EVIDENCE IN CIVIL LITIGATION?**

The polygraphist technique is considered, when in the hands of a duly qualified and experienced expert, to be a scientifically reliable means of detecting deception, that is, that where in response to a given relevant question the subject makes a certain answer, a qualified examiner can determine by studying the recorded tracings whether the subject has been completely truthful, or is withholding some material fact.

The scientific reliability of the polygraphic deception technique compares favorably with such other forms of scientifically acceptable evidence as x-ray films,

electrocardiograms, ballistics comparison tests, electroencephalograms and spectrographic analysis indicating that in the hands of a skilled expert the percentages of probable error are less than one percent.

The polygraph examination is recognized and accepted within the profession of polygraph examiners as a reliable accurate means for detecting deception. Thus, it has a "reasonable" measure of precision in its indications. Experts in this field also agree that polygraph is a valuable aid in connection with determining the kinds of issues involved in a given case.

If the courts judicially notice the basic theories and premises of polygraph, then on proper proof of reliability the evidence becomes admissible based on the proper qualifications of an expert witness. For example, the courts accept such testimony in fingerprint identifications,[1] blood tests,[2] radar[3] ballistics,[4] voice prints,[5] intoxication and psychology. The interrogation must be carefully arranged and supervised. The polygraph recordings must be interpreted and only a trained person skilled in this field is qualified to interpret the results and that interpretation is stated in the form of professional opinion.

It is submitted that the courts in polygraph cases are erroneously applying standards which are not proper for determining the ordinary admissibility of evidence.[6]

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[1] People v. Chimowitz, 237 Mich. 247 (1927)

[2] Schmerber v. California, 384 U.S. 757 (1966)

[3] United States v. Dreos, 156 F. Supp. 200 (D.C. Md., 1958)

[4] Goodall v. United States, 180 F.2d 397

[5] Trimble v. Hedmans, 192 N.W.2d 432 (1971)

[6] For example, the courts do not expect 100 percent accuracy of verbal evidence in testimony.

Admission of testimony of the results of a polygraph test has been found admissible for purposes of impeaching the credibility of a party. *California Insurance Co. v. Allen*, 235 F.2d 178 (5th Cir. 1956)

The capacity of the polygraph instruments to reveal conscious lying on the part of the subject in response to questions asked, and as interpreted by the examiner is regarded as not debatable by authorities in the field of polygraph. Experts in the field recognize the effectiveness of the polygraph when used under favorable conditions. The more logical result is reached by those courts that in each case, give the proponent of the evidence the opportunity to show the factors of reliability are present, including such things as the satisfactory mental, physical and psychological condition of the subject, the competency of the examiner, and the provable accuracy of the instrument used. If it is demonstrated to the court that such factors as those mentioned above are present, the reliability of the polygraph evidence should be thereby established.

The scientific psychological basis for the polygraph examination is well established. Experts assert that the record of one polygraph examination can be interpreted satisfactorily by another expert so long as that second expert knows the particular method used in questioning the subject. This would allow the court to appoint its own examiner to conduct follow-up test to verify the findings of the original examiner.

Appellant submits to the Court that polygraph is a valid tool for discovery and that such evidence should be recognized by the Court as admissible. The polygraph is a diagnostic aid which cannot itself testify, but can be used to provide the basis for expert opinion. A polygraphist does not create responses. He only discovers and reveals what is already there but which, without his interrogative perseverance and the physiologically recorded polygrams, cannot or will not release itself.

The District Court erred in refusing Appellant's motion for admissibility of polygraph evidence because the motion attempted to lay a foundation for the admission of scientific findings based on scientific acceptance and testimony of a trained and experienced polygraphist. Judicial precedent does not hold that particular scientific test as a matter of law is inadmissible, but only that the fact of its general acceptance in the field has not been shown. Polygraph has now become a field unto itself and thus polygraphic principles have gained general acceptance in the particular field in which they belong. The court may condition admission of polygraphic evidence upon a finding that the scientific method has gained general acceptance in its particular field. Polygraphy may properly be deemed a science unto itself in light of the immense independent advances in the field since its inceptional state and the early court decision in *Fry v. United States*, 293 F. 1013 (D.C. Cir., 1923).[7]

Both state and federal courts in the United States have generally held for admission of evidence resulting from polygraph tests when the parties stipulate to the admission of the evidence, when the evidence is offered for a limited purpose only, or when certain factors surrounding the administration of the test are present.

Whether or not the polygraph examination test of truth or deception has reached that level of scientific reliability and acceptability, and industry professionalism, where the results of such a test should be admitted as expert opinion bearing upon the credibility of a party who offers such evidence is one of the critical issues in this appeal.

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[7]General acceptance in the field of polygraphy can be compared by analogy to general acceptance in the field of psychology.

It appears that the federal courts have been unfairly bound by the obsolete decision in *Frye v. United States*, supra, which places an unfair burden on a party attempting to use the polygraph because of an unreasonable judicial attitude that the polygraph does not have general scientific recognition and a requirement demanding infallibility of results.

The passage of fifty years have seen a great many improvements in instrumentation, technique and training of polygraph examiners. The modern polygraph and competent polygraph examiner bear no resemblance to the earlier craftsman of the Frye case.

The clear import of the cases holding polygraph evidence inadmissible is not that evidence concerning the results of polygraph tests are inadmissible as a matter of law, but rather that polygraph evidence may not be admitted into evidence unless a proper foundation establishing its reliability as a scientific test is presented to the trial court.

Polygraph evidence should be admissible upon a strong foundation developed at a hearing that, in essence, the test is generally accepted and that it has a reasonable measure of precision in its indications.[8] "Stipulation" is another foundation upon which the judicial system has received the results of polygraph examinations and rendered decisions accordingly.[9] It was, therefore, proper that Appellant made a motion to the District Court to determine admissibility of polygraph evidence.[10]

[8]United States v. Wainwright, 413 F.2d 796, 803 (10th Cir.), Cert. denied, 396 U.S. 1009 (1969)

[9]State v. Valdez, 91 Ariz. 274, 371 P.2d 894 (1962)

[10]Herman v. Eagle Star Insurance Co., 283 F. Supp. 33, 35-40 (C.D. Cal. 1966), aff'd 396 F.2d 427 (9th Cir., 1968)

Thus, it appears well settled that a stipulation between the parties may serve as the necessary "foundation" for admissibility of polygraphic evidence.[11] Further, that federal courts have admitted into evidence the results of polygraph examinations under court controlled procedures.[12]

The reasoning behind the aforementioned authorities is clearly well founded and this court should reverse the lower court's order denying Appellant use of polygraph.

## II.

## WHETHER DENIAL BY THE DISTRICT COURT OF USE OF POLYGRAPH TEST AND EXPERT TESTIMONY IN DISCOVERY PROCESS DENIES ACCESS TO PROOF NECESSARY TO WITHSTAND APPELLEES MOTION FOR SUMMARY JUDGMENT

The criteria for ascertaining the admissibility of polygraph test results was enunciated in 1923 as "general scientific acceptability"; the rationale and rule of the Frye case has been consistently followed by the authorities in various jurisdictions; a valid scientific test of credibility would be an asset to the judicial process; "General scientific acceptability" does not mean a universality of scientific approval such as would justify judicial notice, but only a substantial body of scientific opinion in support, before scientific evidence should be ruled "admissible" or "inadmissible." The polygraph test should be evaluated just as other types of scientific

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[11]State v. Watson, 115 N.J.S. 213, 278 A.2d 543 (1971)

[12]United States v. Zeigler, 350 F. Supp. 685 (U.S. Dist. Ct. D.C., 1972); 475 F.2d 1280 (U.S. Ct. Appls. Dist. Col. Cir., 1973). Compare with United States v. Ridling, 350 F. Supp. 90 (U.S. Dist. Ct., E.D. Mich., S.D., 1972).

evidence are evaluated and treated similarly by the courts.

The polygraph test is statistically reliable and accurate in better than 96 per cent of cases tested. The polygraph test is as reliable, comparatively, as other scientific devices, instruments and techniques presently recognized as the basis of admissible expert opinion.

Polygraph test results should be admissible where a proper foundation is laid; a proper foundation was laid in this case; the Appellant's motion called for a ruling by the District Court on the question of "admissibility" including a stipulation between the parties which would appear to be a necessary foundation for admissibility of polygraph evidence. The counsel of record for Appellees made no opposition to this motion.

The overwhelming weight of authority holds that polygraph test results are admissible where the parties stipulate thereto in advance of trial; admissibility upon stipulation is recognized not because stipulation are binding, but because courts have found that polygraph test results have a definite probative value.

The court below should have granted Appellant's motion for an impartial polygraph test, upon a showing that such evidence was admissible based upon the accuracy of the technique acceptable by standards of the American Polygraph Association, the field itself and the skills of the particular examining firm available to Appellant.[13]

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[13]In May of 1972, then acting United States Attorney General Richard G. Kleindienst volunteered to take a polygraph test to prove that he has no personal knowledge of any deal between International Telephone and Telegraph Corporation and the Republican Party.

An associate of Washington Columnist Jack Anderson, took a test that showed he was not lying about a meeting with ITT lobbyist Dita Beard in the controversy, according to testimony before the Senate Judiciary Committee.

Public policy does not militate against the admissibility of polygraph tests to the limited extent sought in this appeal for civil litigation. Stipulations are made because attorneys believe their clients, and feel that the polygraph will demonstrate the worth of that belief.

The refusal by the District Court to recognize the validity of a scientific phenomenon supported by the American Polygraph Association and related fields of science appears to be improper, since the polygraph is relied upon by the Federal Bureau of Investigation, the United States Secret Service, numerous state and local law enforcement agencies and by the military services both in this country and overseas.

## III.

## WHETHER A FEDERAL GOVERNMENT AGENCY OR ITS OFFICERS ARE BEYOND THE SUBPOENA POWER OF A FEDERAL COURT?

This Court has jurisdiction because the District Court's orders were "final decisions" within the meaning of 28 U.S.C. §1291. Due regard for efficiency in litigation must not be carried so far as to deny all opportunity for discovery. The appealability of orders cannot be decided by rote. What is controlling or critical is whether the party unsuccessfully seeking the subpoena has any other means of eliciting information or compelling discovery.

In order for a decision to be "final" within the meaning of 28 U.S.C.A. §1291, it is not necessary that it be the last order possible to be made in the case. *Gillespie v. United States Steel Corp.*, 379 U.S. 148, 152-153. Thus, the orders in question fall within that small class of orders which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too

independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546.

The primary factor which gives finality to the orders in question is the effect of the orders upon plaintiff's personal claims. Without the benefit of sufficient discovery to withstand appellee's motion for summary judgment, appellant may have his rights terminated for either failing to make discovery or when the time comes, it will be too late effectively to review present orders and plaintiff's right to discovery will have been lost, probably irreparably.

The orders involved in this appeal are "final" precisely because they are unrelated to the merits of the action. Therefore, the presence of a question of general importance beyond the immediate concern of the litigants is present and review by this Court may settle the matter not simply for the case in hand, but for many others. Immediate review of this Court will advance the ultimate termination of the litigation.

## CONCLUSION

Appellant submits that the lower court should have granted the motions on polygraph and discovery based on the fact (1) that such evidence is essential under Rules 32(a)(1) and 56(e), Federal Rules of Civil Procedure to prove which parties are "willfully" and "knowingly" giving false testimony regarding issue of jurisdiction and exhaustion of agency remedies (2) that such evidence may not be obtained by any other means and is essential to withstand appellees' motion to dismiss or in the alternative, for summary judgment and (3) that relevant expert testimony was available to the lower court by Atlantic Security Agency, Inc. and that

such experts could have testified that the proposed test is an accepted one in their profession including verification that it has a reasonable measure of precision in its indications.

It is respectfully submitted therefore that the orders of the District Court denying discovery and use of polygraph tests should be reversed.

Respectfully submitted,

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Appellant request en banc hearing.